tures on the certificates. I cannot see any distinction between forgery and other fraud, which, it has been contended exists.

Judgment for plaintiff.

Ever since the celebrated "Schuyler Fraud cases" the law of America has been considered settled on the point involved in our principal case. There, as is well known, Robert Schuyler, an officer of the New York and New Haven Railroad Co., fraudulently issued stock, over-issued beyond the amount of the capital stock, which various parties received in good faith, and the company were held responsible to the holders for damages thereby sustained, the certificates themselves being held void and of no value, as, in fact, they represented nothing: *N. Y. & N. H. Railroad Co.* v. *Schuyler*, 34 N. Y. 30 and 80. And this just rule has been repeatedly followed in other states: *Bank of Kentucky* v. *The Schuylkill Bank*, 1 Pars. Eq. R. 180; *Willis* v. *Fry*, 13 Phila. R. 33; 36 Leg. Int. 47.

In such cases the act of the officer, though fraudulent, is the act of the corporation.

In like manner a corporation is liable to the owner of stock whose name has been forged to a transfer of the certificate, and the corporation officers acting thereon in good faith, have cancelled the old certificate and issued a new certificate to the supposed lawful holder by such forged transfer: *Pratt* v. *Machinists' Nat. Bank*, 123 Mass. 110; *Pratt* v. *Boston & Albany Railroad Co.*, 126 Mass. 443; *Blaisdell* v. *Bohr*, 68 Geo. 56; *Pollock* v. *National Bank*, 3 Selden 274; *Sloman* v. *Bank of England*, 14 Sim. 475; *Midland Railway* v. *Taylor*, 8 H. L. Cas. 751.

In such case, however, the corporation is not without remedy, since it has an action over against the party presenting the forged transfer, on the ground of an implied warranty that such transfer is genuine and valid, even if such party be not the forger, but acted in good faith: *Boston & Albany Railroad Co.* v. *Richardson*, 135 Mass. 473.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

CHICAGO, M. & ST. P. RY. CO. *v.* ROSS.

The conductor of a railway train who commands its movements, directs when it shall start, at what stations it shall stop, and at what speed it shall run, and has the general management of it and control over the persons employed upon it, represents the company, and for injuries resulting from his negligent acts the company is responsible.

The conductor of a railway train is the representative of the company, standing in its place and stead in the running of the train. The engineer is in that particular the conductor's subordinate, and for the former's negligence, by which the latter is injured, the company is responsible.

ERROR to the Circuit Court of the United States for the District of Minnesota.

J. W. Cary, for plaintiff in error.

C. K. Davis and *Enoch Totten*, for defendant in error.

The facts are fully stated in the opinion, which was delivered by FIELD, J.—The plaintiff in the court below is a citizen of Minnesota, and by occupation an engineer on a railway train. The defendant in the court below, the plaintiff in error here, is a railway corporation created under the laws of Wisconsin. This action is brought to recover damages for injuries which the plaintiff sustained while engineer of a freight train, by a collision with a gravel train on the 6th of November 1880. Both trains belonged to the company, and for some years he had been employed as such engineer on its roads. On that day he was in charge of the engine of a regular freight train which left Minneapolis at a quarter past one in the morning, its regular schedule time, and had the right of the road over gravel trains, except when otherwise ordered. At the time of the collision one McClintock was the conductor of the train, and had the entire charge of running it. It was his duty, under the regulations of the company, to show to the engineer all orders which he received with respect to the movements of the train. The regulations in this respect were as follows: "Conductors must, in all cases, when running by telegraph and special orders, show the same to the engineer of their train before leaving stations where the orders are received. The engineer must read and understand the order before leaving the station. The conductor will have charge and control of the train, and of all persons employed on it, and is responsible for its movements while on the road, except when his directions conflict with these regulations, or involve any risk or hazard, in which case the engineer will also be held responsible."

When the freight train left Minneapolis on the morning of November 6th 1880, there was coming towards that city from Fort Snelling, by order of the company, over the same road, a gravel train, termed in the complaint a "wild train;" that is, a train not running on schedule time any regular trips. The conductor, McClintock, was informed by telegram from the train dispatcher of the coming of this gravel train, and ordered to hold the freight train at South Minneapolis until the gravel train arrived. South Minneapolis is between Minneapolis and the place where the collision occurred. The gravel train had been engaged for a week

before in hauling in the night gravel to Minneapolis from a pit near Mendota, for the construction by the company of a new and separate line of railroad between St. Paul and Minneapolis, and the freight train had, during this time, been stopped by the conductor, on orders of the train dispatcher, upon side tracks between Minneapolis and St. Paul Junction for the passage of the gravel train. But on the night of November 6th 1880, he neglected to deliver to the plaintiff the order he had received, and after the train started he went into the caboose and there fell asleep. The freight train, of course did not stop at the station designated, but, continuing at a speed of fifteen miles an hour, entered a deep and narrow cut three hundred feet in length, through which the road passed at a considerable curve, and on a down grade, when the plaintiff saw on the bank a reflection of the light from the engine of the gravel train, which was approaching from the opposite direction at a speed of five or six miles an hour, and was then within about one hundred feet. He at once whistled for brakes and reversed his engine, but a collision almost immediately followed, destroying the engines, damaging the cars of the two trains, causing the death of one person, and inflicting upon the plaintiff severe and permanent injuries, for which he brings this action.

On the trial the conductor of the gravel train testified that at the time of the collision he was under orders to run to South Minneapolis regardless of the plaintiff's train; that having twelve cars loaded with gravel his train stalled before reaching the cut where the collision happened; that he then separated his train in the middle, took six cars to Minnehaha station, went back with the engine for the other six cars, and was coming with them through the cut when the collision occurred; that the gravel train had run in the night about a week, and that when he could reach Minneapolis before the starting time of plaintiff's train he ran without orders, otherwise upon orders, and had met or passed plaintiff's train at the same place about every night during the week.

It is evident from this brief statement that the conductor on each train was guilty of gross negligence. The conductor of the freight train was not only required by the general duty devolving on him as one controlling its movements to give to its engineer such orders as would enable him to avoid collision with other cars, but, as we have seen, he was expressly directed by the regulations of the company, when running by telegraph or special orders, to communicate

them to him. Had these regulations been complied with the collision would have been avoided. The conductor of the gravel train allowed it to be so overloaded that its engine was incapable of moving it at one portion of the road before reaching the cut; and when, in consequence, he was obliged to leave half of his cars on the track while he took the others to Minnehaha, he omitted to send forward information of the delay or to put out signals of danger. Having for the week previous passed the freight train at nearly the same place on the road, he must have known that by the delay there was danger of collision. Ordinary prudence, therefore, would have dictated the sending forward of information of his position, or the putting out of danger signals. Had he done either of these things the collision would not have occurred.

The collision having been caused by the gross negligence of the conductors, the question arises whether the company is responsible to the plaintiff for the injuries which that collision inflicted upon him. The general liability of a railroad company for injuries caused by the negligence of its servants to passengers and others not in its service is conceded. It covers all injuries to which they do not contribute. But where injuries befall a servant in its employ, a different principle applies. Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them, he cannot recover compensation from his employer. The obvious reason for this exemption is that he has, or in law is supposed to have, them in contemplation when he engaged in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid. There is also another reason often assigned for this exemption—that of a supposed public policy. It is assumed that the exemption operates as a stimulant to diligence and caution on the part of the servant for his own safety as well as that of his master. Much potency is ascribed to this assumed fact by reference to those cases where diligence and caution on the part of servants constitute the chief protection against accidents. But it may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one, or suffering in the other, damages could be recovered by their representatives or themselves for

the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant. But, however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an injury result, he is as liable to the servant as he would be to a stranger. In other words, while claiming such exemption he must not himself be guilty of contributory negligence.

When the service to be rendered requires for its performance the employment of several persons, as in the movement of railway trains, there is necessarily incident to the service of each the risk that the others may fail in the vigilance and caution essential to his safety. And it has been held in numerous cases, both in this country and in England, that there is implied in his contract of service in such cases that he takes upon himself the risks arising from the negligence of his fellow-servants while in the same employment, provided always the master is not negligent in their selection or retention, or in furnishing adequate materials and means for the work; and that if injuries then befall him from such negligence, the master is not liable. The doctrine was first announced in this country by the Supreme Court of South Carolina in 1841, in *Murray* v. *Railroad Co.*, 1 McMull. 385, and was affirmed by the Supreme Court of Massachusetts the following year in *Farwell* v. *Boston & Worcester R. Co.*, 4 Metc. 49. In the South Carolina case, a fireman, while in the employ of the company, was injured by the negligence of an engineer also in its employ, and it was held that the company was not liable, the court observing that the engineer no more represented the company than the fireman; that each in his separate department represented his principal; that the regular movement of the train of cars to its destination was the result of the ordinary performance by each of his several duties; and that it seemed to be on the part of the several agents a joint undertaking where each one stipulated for the performance of his several part; that they were not liable to the company for the conduct of each other, nor was the company liable to one for the conduct of another, and that, as a general rule, when there was no fault in the owner, he was only liable to his servants for wages.

In the Massachusetts case, an engineer employed by a railroad company to run a train on its road was injured by the negligence of a switch-tender also in its employ, and it was held that the company was not liable. The court placed the exemption of the company, not on the ground of the South Carolina decision, that there was a joint undertaking by the fellow-servants, but on the ground that the contract of the engineer implied that he would take upon himself the risks attending its performance; that those included the injuries which might befall him from the negligence of fellow-servants in the same employment; and that the switch-tender stood in that relation to him. And the court added that the exemption of the master was supported by considerations of policy. "When several persons," it said, "are employed in the conduct of one common enterprise or undertaking, and the safety of each depends on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in the case of loss by the negligence of each other." And to the argument, which was strongly pressed, that though the rule might apply where two or more servants are employed in the same department of duty, where each one can exert some influence over the conduct of the other, and thus, to some extent, provide for his own security, yet that it could not apply where two or more are employed in different departments of duty, at a distanee from each other, and where one can in no degree control or influence the conduct of another, it answered that the objection was founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. "When the object to be accomplished," it said, "is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case." And it added, "that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not

exempt from liability because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied." 4 Metc. 49, 60. The opinion in this case, which was delivered by Chief Justice SHAW, has exerted great influence in controlling the course of decisions in this country. In several states it has been followed, and the English courts have cited it with marked commendation.

The doctrine of the master's exemption from liability was first distinctly announced in England in 1850 by the Court of Exchequer in *Hutchinson* v. *York, N. C. & B. Ry. Co.*, 5 Exch. 343. *Priestly* v. *Fowler*, 3 Mees. & W. 1, which was decided in 1837, and is often cited as the first case declaring the doctrine, did not directly involve the question as to the liability of a master to a servant for the negligence of a fellow-servant. In that case a van of the defendant in which the plaintiff was carried was out of repair, and overloaded, and consequently broke down, and caused the injury complained of; but it did not appear what produced the defect in the van, or by whom it was overloaded. The court, in giving its decision against the plaintiff, observed that if the master was liable, the principle of that liability would "carry us to an alarming extent;" and in illustration of this statement said that if the owner of a carriage was responsible for its sufficiency to his servant, he was, under the principle, responsible for the negligence of his coach-maker, or harness-maker, or coachman, and mentioned other instances of such possible responsibility to a servant for the negligence of his fellows, concluding that the inconvenience of such consequences afforded a sufficient argument against the application of the principle to that case. The case, therefore, can only be considered as indirectly asserting the doctrine. At any rate, the *Hutchinson case* is the first one where the doctrine was applied to railway service. There it appeared that a servant of the company who, in the discharge of his duty, was riding on one of its trains, was injured by a collison with another train of the same company, from which his death ensued; and it was held that his representa-

tives could not recover, as he was a fellow-servant with those who caused the injury; and the court said that whether the death resulted from the mismanagement of the one train or the other, or of both, did not affect the principle. The rule was applied at the same time by that court to exempt a master-builder from liability for the death of a bricklayer in his employ, caused by the defective construction of a scaffolding by his brother workmen, by reason of which it broke, and the bricklayer at work upon it was thrown to the ground and killed. *Wigmore* v. *Jay*, 5 Exch. 354. The doctrine assumes that the servant causing the injury is in the same employment with the servant injured; that is that both are engaged in a common employment. The question in all cases therefore is, what is essential to render the service in which different persons are engaged a common employment? And this question has caused much conflict of opinion between different courts, and often much vacillation of opinion in the same court.

In *Bartonshill Coal Co.* v. *Reid*, and the *Same Co.* v. *McGuire*, reported in 3 Macq. H. L. Cas. 266, 300, decided in 1858, the parties injured were miners employed to work in a coal-pit; and the party whose negligence caused the injury was employed to attend to the engine by which they were let down into the mine and brought out, and the coal was raised which they had dug; and it was held that they were engaged in a common work, that of getting coal from the pit. "The miners," said the court in the latter case, could not perform their part unless they were lowered to their work; nor could the end of their common labor be attained unless the coal which they got was raised to the pit's mouth; and, of course, at the close of their day's labor the workman must be lifted out of the mine. Every person who engaged in such an employment must have been perfectly aware that all this was incident to it, and that the service was necessarily accompanied with the danger that the person intrusted with the machinery might be occasionally negligent, and fail in his duty." Lord Chancellor CHELMSFORD, who gave the principal opinion in the latter case, referred to previous cases in which the master's exemption from liability had been sustained, and said: "In the consideration of these cases it did not become necessary to define with any great precision what was meant by the words 'common service' or 'common employment,' and perhaps it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case to

ascertain whether servants are fellow-laborers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore are engaged in different departments of duty, an injury committed by one servant upon another, by carelessness or negligence in the course of his peculiar work, is not within the exemption, and the master's liability attaches in that case in the same manner as if the injured servants stood in no such relation to him." The Lord Chancellor also commented upon some decisions of the Scotch courts, and among others that of *McNaughton* v. *Caledonian Ry. Co.*, 19 Ct. Sess. Cas. 271, and said that it might be "sustained without conflicting with the English authorities, on the ground that the workmen in that case were engaged in totally different departments of work, the deceased being a joiner or carpenter who, at the time of the accident, was engaged in repairing a railway carriage; and the persons by whose negligence his death was occasioned, were the engine-driver and the persons who arranged the switches." And in the same case Lord BROUGHAM, after mentioning the observations of a judge of the Scottish courts that an absolute and inflexible rule, releasing the master from responsibility in every case where one servant is injured by the fault of another, was utterly unknown to the law of Scotland, said that it was also utterly unknown to the law of England, and added: "To bring the case within the exemption there must be this most material qualification: that the two servants must be men in the same common employment, and engaged in the same common work under that common employment."

Later decisions in the English courts extend the master's exemption from liability to cases where the servant injured is working under the direction of a foreman or superintendent, the grade of service of the latter not being deemed to change the relation of the two as fellow-servants. Thus, in *Wilson* v. *Merry*, decided by the House of Lords in 1868, on appeal from the Court of Session of Scotland, the sub-manager of a coal-pit, whose negligence in erecting a scaffold which obstructed the circulation of air underneath, led to an accumulation of fire-damp that exploded and injured a workman in the mine, was held to be a fellow-servant with the injured party. And the court laid down the rule that the master was not

liable to his servant unless there was negligence on the master's part in that which he had contracted with the servant to do, and that the master, if not personally superintending the work, was only bound to select proper and competent persons to do so, and furnish them with adequate materials and resources for the work; that when he had done this he had done all that he was required to do, and if the persons thus selected were guilty of negligence, it was not his negligence, and he was not responsible for the consequences. L. R., 1 H. L. Scotch App. 326. In this case, as in many others in the English courts, the foreman, manager, or superintendent of the work, by whose negligence the injury was committed, was himself also a workman with the other laborers, although exercising a direction over the work. The reasoning of that case has been applied so as to include, as contended here, employees of a corporation in a department separated from each other, and it must be admitted that the terms "common employment," under late decisions in England, and the decisions in this country following the Massachusetts case, are of very comprehensive import. It is difficult to limit them so as to say that any persons employed by a railway company, whose labors may facilitate the running of its trains, are not fellow-servants, however widely separated may be their labors. See *Holden* v. *Fitchburg R. Co.*, 129 Mass. 268. But, notwithstanding the number and weight of such decisions, there are, in this country, many adjudications of courts of great learning restricting the exemption to cases where the fellow-servants are engaged in the same department, and act under the same immediate direction; and holding that, within the reason and principle of the doctrine, only such servants can be considered as engaged in the same common employment. It is not, however, essential to the decision of the present controversy to lay down a rule which will determine, in all cases, what is to be deemed such an employment, even if it were possible to do so.

There is, in our judgment, a clear distinction to be made in their relation to their common principal between servants of a corporation exercising no supervision over others engaged with them in the same employment and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor having the entire control and management of a railway train occupies a very different position from the brakeman, the porters,

and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the term is he a fellow-servant with the fireman, the brakeman, the porters, and the engineer. The latter are fellow-servants in the running of the train under his direction, who as to them and the train, stands in the place of and represents the corporation.

As observed by Mr. Wharton in his valuable Treatise on the Law of Negligence: "It has sometimes been said that a corporation is obliged to act always by servants, and that it is unjust to impute to it personal negligence in cases where it is impossible for it to be negligent personally. But if this be true it would relieve corporations from all liability to servants. The true view is that, as corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation." Section 232 *a*. The author, in a note, refers to *Brickner* v. *New York Cent. R. Co.*, decided in the Supreme Court of New York, and afterwards affirmed in the Court of Appeals; and to *Malone* v. *Hathaway*, decided in the latter court, in which opinions are expressed in conformity with his views. These opinions are not, it is true, authoritative, for they do not cover the precise points in judgment; but were rather expressed to distinguish the questions thus arising from those then before the

court. They indicate, however a disposition to ingraft a limitation upon the doctrine as to the master's exemption from liability to his servants for the negligence of their fellows, when a corporation is the principal, and acts through superintending agents. Thus, in the first case, the court said: "A corporation cannot act personally. It requires some person to superintend structures, to purchase and control the running of cars, to employ and discharge men, and provide all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents, they are the representatives of the corporation. They are then the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When the directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointee, equally with themselves, represents the corporation as master in all those respects. And though, in the performance of these executive duties, he may be, and is, a servant of the corporation, he is not in those respects a co-servant, a co-laborer, a co-employee, in the common acceptation of those terms, any more than is a director who exercises the same authority." 2 Lans. 516. Affirmed in 49 N. Y. 672. And in *Malone* v. *Hathaway*, in the Court of Appeals, Judge ALLEN says: "Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employees, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duties, exercising the discretion ordinarily exercised by principals, and, within the limits of the delegated authority, the acting principal. These acts are in such case the acts of the corporation, for which and for whose neglect, the corporation, within adjudged cases, must respond, as well to the other servants of the company as to strangers. They are treated as the general agents of the corporation in the several departments committed to their care." 64 N. Y. 12. See, also, *Corcoran* v. *Holbrook*, 59 N. Y. 517.

In *Little Miami R. Co.* v. *Stevens*, the Supreme Court of Ohio held that where a railroad company placed the engineer in its employ under the control of a conductor of its train, who directed when the

cars were to start and when to stop, it was liable for an injury received by him caused by the negligence of the conductor: 20 Ohio 415. There a collision between two trains occurred in consequence of the omission of the conductor to inform the engineer of a change of places in the passing of trains ordered by the company. Exemption from liability was claimed on the ground that the engineer and conductor were fellow-servants, and that the engineer had, in consequence, taken, by his contract of service, the risk of the negligence of the conductor; and also that public policy forbade a recovery in such cases. But the court rejected both positions. To the latter it very pertinently observed that it was only when the servant had himself been careful that any right of action could accrue to him, and that it was not likely that any would be careless of their lives and persons or property merely because they might have a right of action to recover for injuries received. "If men are influenced," said the court, "by such remote considerations to be careless of what they are likely to be most careful about, it has never come under our observation. We think the policy is clearly on the other side. It is a matter of universal observation that, in any extensive business where many persons are employed, the care and prudence of the employer is the surest guaranty against mismanagement of any kind." In *Railway Co.* v. *Keary*, 3 Ohio St. 201, the same court affirmed the doctrine thus announced, and decided that when a brakeman in the employ of a railroad company, on a train under the control of a conductor having exclusive command, was injured by the carelessness of the conductor, the company was responsible; holding that the conductor in such case was the sole and immediate representative of the company, upon which rested the obligation to manage the train with skill and care. In the course of an elaborate opinion the court said that, from the very nature of the contract of service between the company and employees, the company was under obligation to them to superintend and control with skill and care the dangerous force employed, upon which their safety so essentially depended. "For this purpose," said the court, "the conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogatives of the owner, and in its exercise he stands in the place of the owner, and is in the discharge of a duty which the owner, as

a man, and a party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity. His will alone controls everything, and it is the will of the owner that his intelligence alone should be trusted for this purpose. This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both necessary to produce the result. It is his to command and theirs to obey and execute. No service is common that does not admit a common participation, and no servants are fellow-servants when one is placed in control over the other."

In *Louisville & N. R. Co.* v. *Collins*, 2 Duv. 114, the subject was elaborately considered by the Court of Appeals of Kentucky; and it held that, in all those operations which require care, vigilance and skill, and which are performed through the instrumentality of superintending agents, the invisible corporation, though never actually, is yet always constructively, present through its agents who represent it, and whose acts, within their respective spheres, are its acts; that the rule of the English courts, that the company is not responsible to one of its servants for an injury inflicted from the neglect of a fellow-servant, was not adopted to its full extent in that state, and was regarded there as anomalous, inconsistent with principle and public policy, and unsupported by any good and consistent reason. In commenting upon this decision in his Treatise on the Law of Railways, Redfield speaks with emphatic approval of the declaration that the corporation is to be regarded as constructively present in all acts performed by its general agents within the scope of their authority. "The consequences of mistake or misapprehension upon this point," says the author, "have led many courts into conclusions greatly at variance with the common instincts of reason and humanity, and have tended to interpose an unwarrantable shield between the conduct of railway employees and the just responsibility of the company. We trust that the reasonableness and justice of this construction will, at no distant day, induce its universal adoption."

There are decisions in the courts of other states, more or less in conformity with those cited from Ohio and Kentucky, rejecting or limiting, to a greater or less extent, the master's exemption from liability to a servant for the negligent conduct of his fellows. We agree with them in holding—and the present case requires no

further decision—that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner. If, now, we apply these views of the relation of the conductor of a railway train to the company, and to the subordinates under him on the train, the objections urged to the charge of the court will be readily disposed of. Its language, in some sentences, may be open to verbal criticism, but its purport touching the liability of the company is that the conductor and engineer, though both employees, were not fellow-servants in the sense in which that term is used in the decisions; that the former was the representative of the company, standing in its place and stead in the running of the train, and that the latter was, in that particular, his subordinate, and that for the former's negligence, by which the latter was injured, the company was responsible.

It was not disputed on the trial that the collision which caused the injury complained of was the result of the negligence of the conductor of the freight train, in failing to show to the engineer the order which he had received, to stop the train at South Minneapolis until the gravel train, coming on the same road from an opposite direction, had passed; and the court charged the jury that if they so found, and if the plaintiff did not contribute to his injury by his own negligence, the company was liable; holding that the relation of superior and inferior was created by the company, as between the two, in the operation of its train, and that they were not, within the reason of the law, fellow-servants engaged in the same common employment. As this charge was, in our judgment, correct, the plaintiff was entitled to recover upon the conceded negligence of the conductor. The charge on other points is immaterial; whether correct or erroneous, it could not have changed the result; the verdict of the jury could not have been otherwise than for the plaintiff. Without declaring, therefore, whether any error was committed in the charge on other points, it is sufficient to say that we will not reverse the judgment below if an error was committed on the trial which could not have affected the verdict. *Brobst* v. *Brock*, 10 Wall. 519. And, with respect to the negli-

gence of the conductor of the gravel train, no instruction was given or requested.

Judgment affirmed.

BRADLEY, J.—Justices MATTHEWS, GRAY, BLATCHFORD and myself dissent from the judgment of the court. We think that the conductor of the railroad train in this case was a fellow-servant of the railroad company with the other employees on the train. We think that to hold otherwise would be to break down the long-established rule with regard to the exemption from responsibility of employers for injuries to their servants by the negligence of their fellow-servants.

LIABILITY OF MASTER FOR NEGLIGENCE OF FELLOW-SERVANT.—The general principle which prevails in England and the United States is, that one who enters the service of another takes upon himself the ordinary risks of the employment in which he engages, including the negligent acts of his fellow-servants in the course of the common employment. The first English authority upon the subject is the case of *Priestly* v. *Fowler*, 3 Mees. & Wels. 1, decided in 1837. In the United States the question does not seem to have been passed upon until 1841, in *Murray* v. *Railway Co.*, 1 McMullan 385. The next case was *Farwell* v. *Boston, &c., Ry.*, 4 Met. 49. In this case Mr. Chief Justice SHAW, in an exhaustive opinion, approved the former cases. The general doctrine of these cases has since been followed both in England and the United States. *Skip* v. *England Eastern Counties Railway Co.*, 9 Exch. 223; *State* v. *Malster*, 57 Md. 287; *Blake* v. *Ill. Cent. Ry. Co.*, 70 Ill. 60; *Gravelle* v. *Minn. &c., Ry. Co.*, 3 McCrary 352; *Beilfus* v. *N. Y. Cent. Ry.*, 29 Hun 556; *Rohback* v. *Pacific Ry.*, 43 Mo. 187; *Wonder* v. *B. & O. Ry. Co.*, 32 Md. 411; *Summerhays* v. *Kan. Pa. Ry. Co.*, 2 Col. 484; *Yeomans* v. *Contra Costa Co. Co.*, 44 Cal. 71; *Brothers* v. *Cartter*, 52 Mo. 372; *Quincy Mining Co.* v. *Kitts*, 42 Mich. 34; *C., B. & Q. Ry.* v. *Clark*, 2 Brad. 596; *Murray* v. *Currie*, L. R., 6 C. P. 24; *Price* v. *H. D. N. Co.*, 46 Tex. 535.

This principle applies to a minor 19 years of age. But in *Siegel* v. *Schantz*, 2 N. Y. (S. C.) 353, the master was held liable for the negligence of a foreman in placing a boy of 12 years in a dangerous position. See also *Coombs* v. *New Bedford C. Co.*, 102 Mass. 573. And a railway company is liable where a minor is set to do perilous work for which he was not employed. *Ry. Co.* v. *Fort*, 17 Wall. 553. But see *Anderson* v. *Morrison*, 22 Minn. 274; *Curran* v. *Merchants' Manuf. Co.*, 130 Mass. 374.

As to what negligence is deemed that of a fellow-servant, see *Smith* v. *Lowell Manuf. Co.*, 124 Mass. 114; *Killea* v. *Faxon*, 125 Mass. 485. A railway company is not liable for damages at the suit of one of its employees, for injuries received in a collision between two trains, when such collision is caused by the gross negligence of those in charge of one of the trains. *Bull* v. *Mobile, &c., Ry. Co.*, 67 Ala. 206; *Chicago, &c., Ry. Co.* v. *Doyle*, 60 Miss. 977. In *Stringham* v. *Steuart*, 64 How. Pr. 5, the plaintiff, a servant of the defendant, was injured by the falling of an elevator used to hoist grain into a storage building. The accident was occasioned by the negligence of the engineer in charge, in allowing the elevator to be carried too high, thereby breaking the rope by which it was raised.

The defendant was held not liable. As to what is a sufficient averment of the negligence of a fellow-servant, see *Helfrich* v. *Williams*, 84 Ind. 553. But a master is not relieved from liability in all cases when a servant is injured by the negligence of a fellow-servant, but only where the servants are engaged in the same common employment; that is, in the same department of duty, not in departments essentially *foreign* to each other. *King* v. *Ohio, &c., Ry. Co.*, 14 Fed. R. 277. For instances in which the master has been held liable, see *Texas M. R. Co.* v. *Whitmore*, 58 Tex. 276; *Sheehan* v. *N. Y. Cent. Ry. Co.*, 91 N. Y. 332.

In *Grand Trunk Ry. Co.* v. *Cummings*, 106 U. S. 700, the plaintiff in the course of his employment as an engine driver for the defendant, was injured by the collision of the train on which he was, with another train. *Held*, that if the negligence of the defendant had a share in causing the injuries to plaintiff, it was liable, notwithstanding the contributory negligence of his fellow-servant.

Where the liability of a railway company for injury to one of its track repairers, by the careless manner of running a train, is in issue, evidence tending to show that the train causing the injury was in charge of a conductor and an engineer, and was at the time engaged in a race at a high and dangerous rate of speed with a train on a parallel road, over several public crossings, on a curve on which the track repairer was at work, in the city limits, and where trains should be run with care corresponding with the circumstances, without sound of bell or whistle, or slack of speed, or any other precaution to warn the men employed at work on the track of approaching danger, is competent to go to the jury, and should be submitted to it under proper instructions, and it is error to grant a nonsuit on the assumption that the negligence and carelessness causing the injury was that of a co-employee in the same service, and not that of the company. *Dick* v. *Railway Co.*, 38 Ohio St. 390.

In some states the common-law rule has been changed by statute, so far as employees of railways are concerned. *Pyne* v. *C., B. & Q. Ry. Co.*, 54 Iowa 223; *Ditberner* v. *Chicago, &c., Ry. Co.*, 47 Wis. 138; *Union Trust Co.* v. *Thomason*, 25 Kan. 1; *Peterson* v. *W. Coal & M. Co.*, 50 Iowa 674; *Mo. Pacific Ry. Co.* v. *Haley*, 25 Kan. 35. In the latter case it was held that a person employed upon a construction train to carry water for the men working with the train, and to gather up the tools and put them in the caboose or tool car, was within the statute making railway companies liable to their employees for injuries resulting from the negligence of co-employees, who under the Iowa statute are to be regarded as engaged in the *operation* of a railway. See *Schroeder* v. *C. R. Ry. Co.*, 47 Iowa 375; *Lombard* v. *C., &c., Ry.*, Id. 494; *Smith* v. *B. C., &c., Ry. Co.*, 59 Id. 73.

As to the general rule, as was said by Mr. Justice HARLAN, in *Hough* v. *Railway Co.*, 100 U. S. 214, "very little conflict of opinion is to be found in the adjudged cases, where the court has been at liberty to consider it upon principle, uncontrolled by statutory regulations. The difficulty has been in its practical application to the special circumstances of particular cases. What are the natural and ordinary risks incident to the work in which the servant engages? what are the perils which, in legal contemplation, are presumed to be adjusted in the stipulated compensation? who, within the true sense of the rule, or upon grounds of public policy, are to be deemed 'fellow-servants' in the same common employment or undertaking—are questions in reference to which much contrariety of opinion exists in the courts of the several states. Many of the cases are very wide apart in the solution of those questions."

WHO ARE FELLOW SERVANTS.—A "fellow servant," within the meaning of

the general rule, is usually held to be any one serving the same master in the same common employment, and under his control, whether equal, inferior or superior in his grade or standing. Thus an overseer is a fellow-servant of the laborer under his charge: *Brown* v. *Winona, &c., Ry.*, 27 Minn. 162. A mere foreman and workman under him are fellow-servants: *Feltham* v. *England*, L. R., 2 Q. B. 33; *Keystone Bridge Co.* v. *Newberry*, 96 Penn. St. 246; *C. & T. Ry. Co.* v. *Simmons*, 11 Brad. 147; *Daubert* v. *Pickel*, 4 Mo. App. 591; *Hoth* v. *Peters*, 55 Wis. 405; *Peterson* v. *W. Coal & Min. Co.*, 50 Iowa 674.

The following have been held to be fellow-servants: A laborer engaged in the service of a city and the foreman over him: *McDermott* v. *Boston*, 133 Mass. 349. A foreman of a lock who was engaged in superintending the raising of a vessel in the lock, and a laborer in the same work. See also *McDonald* v. *Eagle, &c., Co.*, 67 Ga. 761; s. c. 68 Id. 839. A switch tender, and an engineer; *C., R. I., &c., Ry. Co.* v. *Henry*, 7 Br d. 322. A detective employed to watch a track, and those running trains: *Pyne* v. *C., B. & Q. Ry. Co.*, 54 Iowa 223. A track repairer and a brakeman: *Holden* v. *Fitchburg Ry. Co.*, 129 Mass. 268. A yard switchman, and a car inspector: *Gibson* v. *N. C. Ry. Co.*, 22 Hun 289. A yard-master and his associate: *McCosker* v. *Long Id. Ry. Co.*, 84 N. Y. 77. A fireman and a brakeman on the same train: *Greenwald* v. *M. H., &c., Ry. Co.*, 49 Mich. 197; *Nashville C., &c., Ry. Co.* v. *Wheless*, 10 Lea (Tenn.) 741; s. c. 43 Am. R. 317. A conductor and a brakeman: *Thayer* v. *St. L., &c., Ry. Co.*, 22 Ind. 26; *Smith* v. *T. P. M. Ry. Co.*, 46 Mich. 258. Engineer and telegraph operator, under certain circumstances: *Dana* v. *N. Y. Cent. Ry.*, 23 Hun 473. Engineer and brakeman: *Railway Co.* v. *Ranney*, 37 Ohio St. 665. The runner of a steam-engine employed in lowering material and hoisting rock, in sinking a shaft, and the men in the shaft engaged in excavating and loading the rock to be hoisted: *Buckley* v. *Gould, &c., Co.*, 8 Sawyer C. C. 395; s. c. 14 Fed. R. 833 and note. Yard hand and person employed to strip engines: *C. & N. W. Ry. Co.* v. *Scheuring*, 4 Brad. 534. A "mining boss" and a "drain boss." *Lehigh Val. Ry. Co.* v. *Jones*, 86 Pa. St. 433. A journeyman carpenter and bridge builder, and one laboring with him and directing the job. *Yager* v. *Atlantic, &c., Ry.*, 4 Hughes 192. Superintendent, who received half of the profits, and one employed as a laborer. *Zeigler* v. *Day*, 123 Mass. 152. A road master, whose duty it was to turn the switch, and the fireman and engineer. *Walker* v. *B. & M. Ry. Co.*, 128 Mass. 8. *Miller* v. *B. & M. Ry.* Id. Coupler of cars and an engineer. *Valterz* v. *O. & M. Ry. Co.*, 85 Ill. 500. "Mining bosses" and miners under the provisions of the Mine Ventilation Act of 1870. *Del., &c., Canal Co.* v. *Carroll*, 89 Pa. St. 374. Laborer employed in hoisting coal by machinery, and engineer tending the engine running the same. *Wood* v. *New Bedford Coal Co.*, 121 Mass. 252. *Prima facie* a person employed to superintend the digging of a trench, and the laborers employed to dig it. *Flynn* v. *Salem*, 134 Mass. 351; *Floyd* v. *Sugden*, 134 Mass. 563.

See generally as to who are fellow-servants—*Lovegrove* v. *L., &c., Ry. Co.*, 16 C. B. (N. S.) 669; *Kelly* v. *Johnson*, 128 Mass. 530; *Crispin* v. *Babbitt*, 81 N. Y. 516; *Nat. Tube Works* v. *Bedell*, 96 Pa. St. 175; *Keystone Bridge Co.* v. *Kennedy*, Id. 246; *Wiggett* v. *Fox*, 11 Exch. 832; *Barringer* v. *Del., &c., Canal Co.*, 19 Hun. 216; *McAndrews* v. *Burns*, 39 N. J. L. 117; *Albro* v. *Agawam, &c., Co.*, 6 Cush. 75; *Railway Co.* v. *Lewis*, 33 Ohio St. 196. Whether a stevedore and a laborer are fellow-servants held, under the circumstances, a fact for the jury. *Mullan* v. *P. & C. Steamship Co.*, 78 Ill. 25; s. c.

21 Am. Rep. 2; *Hass* v. *P. & C. Steamship Co.*, 88 Pa. St. 269. See also *Shedd* v. *Moran*, 10 Brad. 618.

The fact that a foreman was, under certain circumstances, allowed to hire and discharge men, does not of itself make him the agent of the principal. *Hamilton* v. *Iron, &c., Co.*, 4 Mo. App. 564. Nor does the fact that one employee upon a railway is hired and discharged by one superior agent and another by another, affect the relation of the employees to each other as fellow-servants. *Slater* v. *Jewett*, 85 Ill. 61; s. c. 39 Am. Rep. 627. Where a railway company leases of another company its track, the trains of the lessee being allowed to run over such track, subject to the control, rules and orders of the lessor, by virtue of an agreement to that effect between the companies, the lessor will be regarded as the common master of the servants of the lessee, while running its trains on the leased track, and the employees of the two companies as fellow-servants of the lessor. *C., B. & Q. Ry. Co.* v. *Clark*, 2 Brad. 596.

In *Smith* v. *Flint, &c., Ry. Co.*, 46 Mich. 258, a brakeman in coupling cars had his arm crushed by a loosened dead-wood which had come from another road. It was the business of inspectors employed on both roads to see that cars transferred were in proper condition. *Held*, that the car inspector was a fellow-servant of the brakeman, and that the latter could not recover from the railway company.

A railway company is not liable for injuries inflicted through the negligence of its servants, upon a stranger to the company while engaged in the voluntary service of the company in uncoupling the cars, if by his negligence he contributed to the injury: *N. O. Ry. Co.* v. *Harrison*, 48 Miss. 112; s. c. 12 Am. Rep. 356; see *Flower* v. *Penn. R. R. Co.*, 69 Pa. St. 210; *Dagg* v. *Midland Ry. Co.*, 1 Hurlst. & N. 772.

In *Beilfus* v. *N. Y., &c., Ry. Co.*, 29 Hun 556, a wrecking train had been sent out under charge of one S., who was employed by the railway company to superintend the removing of wrecks, under the orders of the person in charge of the shops and yards. While the cars were being replaced the plaintiff's intestate was killed by the upsetting of the car, which was caused by an improper and negligent order given by S. *Held*, that S. was a fellow-servant of the deceased, and that the company was not responsible for his negligence.

In *Howland* v. *L. S. & W. Ry. Co.*, 54 Wis. 226, the plaintiff, while going, as a shoveler of snow for the defendant company, upon a train engaged in removing snow from the track, was injured by the overturning of the car in which he rode, by reason of an unsuccessful attempt of the conductor to remove a snow-bank from the track by means of the snow-plow alone, aided by the momentum of the train. *Held*, that a recovery by the plaintiff was precluded by the fact that such overturning of his car was one of the perils of the business which he assumed, and that the conductor and others whose negligence was alleged were fellow-servants in the same employment.

In *Searle* v. *Lindsay*, 11 C. B. (N. S.) 429, the plaintiff was engaged as third engineer on board a steam vessel, and while employed with others under order of the chief engineer in turning a winch, one of the handles came off in consequence of the machinery being, through the negligence of the chief engineer, in a defective and unsafe condition, and the plaintiff was seriously injured. *Held*, that the owners were not liable.

Where the service of workmen is divided into different departments and each department committed to distinct bodies of workmen, an injury to a servant of one class resulting from the negligence of a servant in the other class, will entitle the servant injured to invoke the doctrine of *respondeat superior*. But

where the different classes of work are committed to the whole body of workmen without regard to its character, they are fellow-servants, and the employer is not liable. Whether in any given case the two species of service form two departments, or one, is a question of fact for the jury. *Holton* v. *Daly*, 4 Brad. 25.

WHO ARE NOT FELLOW-SERVANTS.—Whoever exercises the power of appointing and removing employees or servants, though his grade of employment as to other matters makes him their fellow-servant, exercises a corporate function and renders the corporation liable for his negligence. *Tyson* v. *S. & N. Al. Ry. Co.*, 61 Ala. 554. A superintendent who employs and discharges the laborers and employees is not a fellow-servant of theirs, but represents the master. *Mitchell* v. *Robinson*, 80 Ind. 281.

The following have been held not to be fellow-servants: A fireman and a master of a vessel. *The Classop*, 7 Sawyer C. C. 274. An employee in charge of a train, and an employee in the company's carpenter shop. *Ryan* v. *Chicago & North Western Ry. Co.*, 60 Ill. 171. A track repairer and a fireman. *C. & N. W. Ry. Co.* v. *Moranda*, 93 Ill. 302. Persons engaged in loading cars with freight and switch tender. *C., R. I., &c., Ry.* v. *Henry*, 7 Brad. 322. To the same effect is: *Whalon* v. *Centenuary Church*, 62 Mo. 327; *Gormly* v. *Vulcan Iron Works*, 61 Mo. 492; *Beeson* v. *Green Mt., &c., Ry. Co.*, 57 Cal. 20; *Walker* v. *Bolling*, 22 Ala. 294; *Devany* v. *Vulcan Iron Works*, 4 Mo. App. 236; *Devine* v. *Tarrytown, &c., Co.*, 22 Hun 26. Engineer of train carrying day laborers to work, and such laborers. *Russell* v. *Hudson R. Ry. Co.*, 5 Duer 39. But *contra*, *Ryan* v. *C. V. Ry. Co.*, 23 Pa. St. 384; *Gillshannon* v. *S. B. Ry. Co.*, 10 Cush. 228. A general foreman who has full charge and supervision of a work, who makes out the pay-roll, engages and discharges men, and the laborers under him. *Eagan* v. *Tucker*, 18 Hun 347. To the same effect is: *Dowling* v. *Allen*, 74 Mo. 13; s. c. 41 Am. Rep. 298; *Schultz* v. *C. M., &c., Ry. Co.*, 48 Wis. 375; *Brabbitts* v. *C. & N. W. Ry.*, 38 Id. 289. See note to *Malone* v. *Hathaway*, 21 Am. Rep. 579; *Miller* v. *Union Pa. Ry.*, 17 Fed. R. 67; *Gravelle* v. *Minneapolis, &c., Ry. Co.*, 3 McCrary C. C. 352. A day laborer on the track of a railway, and an engine driver. *T. W., &c., Ry. Co.* v. *O'Connor*, 77 Ill. 391. A mining captain, having the entire management of the mine, and a laborer in the mine. *Ryan* v. *Bagaley*, 50 Mich. 179; 45 Am. Rep. 35. Workmen employed by cotton manufacturing company to keep the machinery of the mill in repair, and a weaver in the factory. *Gunter* v. *Graniteville, &c., Company*, 18 S. C. 263.

The rule of *respondeat superior* applies where an employee of a railway company is injured by reason of the negligence of another employee of the same company, engaged in a separate and distinct department, having no immediate connection with that in which the injured employee is engaged. *N., &c., Ry. Co.* v. *Carroll*, 6 Heisk. (Tenn.) 347.

In Ohio it is well settled that where one servant is placed by his employer in a position of subordination to, and subject to the orders and control of others, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable: *Berea Stone Co.* v. *Kraft*, 31 Ohio St. 292; *Railway Co.* v. *Stevens*, 20 Ohio 415; *C. C., &c., Ry.* v. *Keary*, 3 Ohio St. 201; *M. R., &c., Ry.* v. *Barber*, 5 Id. 541; *P. & Ft., &c., Ry. Co.* v. *Devinney*, 17 Id. 197. See also *Lake Shore, &c., Ry. Co.* v. *Lavalley*, 36 Ohio St. 221.

A section foreman, whose duty it is to keep the track in repair and free from obstructions, in this particular represents the company, and is not a fellow-servant with a switchman; *Hall* v. *Mo. Pacific Ry. Co.*, 74 Mo. 298. This rule was laid down in *Lewis* v. *Ry. Co.*, 59 Mo. 495, and has since been followed in the Missouri courts.

In *Abraham* v. *Reynolds*, 5 Hurlst. & N. 143, the plaintiff, a servant of J. & Co., who were employed by the defendants to carry cotton from a warehouse, was receiving the cotton into his lorry, when, in consequence of the negligence of defendants' porter in lowering the bales from the upper floor of the warehouse, a bale fell upon him. *Held*, that the plaintiff and defendants' servant not being under the same control, or forming part of the same establishment, were not so employed on a common object as to deprive the plaintiff of a right of action against the defendants for such negligence.

In *Baird* v. *Pettit*, 70 Pa. St. 447, the plaintiff was employed as a draftsman in the defendant's locomotive works. A carpenter employed in "jobbing" for defendant in any part of the warehouse, was by the direction of the defendant, superintending the excavation of a cellar under the building, employing hands, etc. He had a large pile of dirt thrown on the public walk. The plaintiff, in leaving the house in the dark after ceasing work, fell over the dirt and was injured. *Held*, that they were not fellow-servants and that the defendants were liable. *Held*, further, that the plaintiff having ceased work and left the shop, the relation of master and servant had ceased, and the defendant was liable to him as to any other citizen.

As to when employee deemed *alter ego* of master, see generally, *Foues* v. *Phillips*, 39 Ark. 17; *Hart* v. *N. Y., &c., Dock Co.*, 48 Supr. Ct. 460; *Dwyer* v. *Am. Ex. Co.*, 55 Wis. 453; *Dobbin* v. *Ry. Co.*, 81 N. C. 447.

MODIFICATION OF THE GENERAL RULE.—To the general rule of law that the master is not responsible to one servant for an injury occasioned by the negligence of a co-servant of the common employer, there are two well-defined exceptions:

First.—Where the servant whose negligence caused the injury was an unfit and incompetent person to be intrusted with the duty to which he was assigned, and the accident resulted from his incompetency and unfitness; *Laning* v. *N. Y. Cent. Ry. Co.*, 49 N. Y. 521.

Second.—Where the accident resulted from unsafe and imperfect machinery, and appliances, furnished for the use of the servant in the master's business; *Laning* v. *N. Y. Cent. Ry. Co.*, *supra*; *Flike* v. *Boston & Alb. Ry Co.*, 53 N. Y. 550; *Fuller* v. *Jewett*, 80 N. Y. 46.

These exceptions, however, are subject to the qualification that the duty imposed upon the master to furnish competent servants, and to furnish fit and safe machinery, is not absolute, but relative. The master does not guarantee either the competency of the co-servants or the satety of the machinery: *G. H., &c., Ry. Co.* v. *Delahunty*, 53 Tex. 206; *C. & N. W. Ry. Co.* v. *Scheuring*, 4 Brad. 533; *Slater* v. *Jewett*, 85 N. Y. 61; *C. & N. W. Ry. Co.* v. *Bragonier*, 11 Brad. 517; *Buckley* v. *Gould, &c., Co.*, 8 Sawy. C. C. 395; s. c. 14 Fed. R. 833. He undertakes to use due and reasonable care in both respects: *Murphy* v. *Boston, &c., Ry. Co.*, 88 N. Y. 146; *Kain* v. *Smith*, 25 Hun 146; *Lambert* v. *Pickel*, 4 Mo. App. 590; *Colton* v. *Richards*, 123 Mass. 484; *Ala. & Fla. Ry. Co.* v. *Walker*, 48 Ala. 460; *Tyson* v. *S. & N. A. Ry. Co.*, 61 Ala. 554; *McDonald* v. *Hazletine*, 53 Cal. 35; *H. & T. C. Ry.* v. *Meyers*, 55 Tex. 110; *Currow* v. *Merchants' Manufacturing Co.*, 135 Mass. 374; *King* v. *Ohio, &c., Ry. Co.*, 14 Fed. Rep. 277.

DUTY OF MASTER GENERALLY.—The duty of the master to the servant, or

his implied contract with his servant, is admirably described by FOLGER, J., in *Laning* v. *N. Y. Cent. Ry.*, 49 N. Y. 532. Said he: "That duty or contract is to the result that the servant shall be under no risk from imperfect or inadequate machinery, or other material means and appliances, or from unskilful or incompetent fellow-servants of any grade. It is a duty or contract to be affirmatively and positively performed, and there is not a performance of it until there has been placed for the servant's use, perfect and adequate physical means, and for his helpmates fit and competent fellow-servants; or due care used to that end. That some general agent clothed with the power, and charged with the duty to make performance for the master, has not done his duty at all, or has not done it well, neither shows a performance by the master, nor excuses the master's non-performance,—when it is done, and not till then, is his duty met or his contract kept. The servant here takes the risk of the negligence of his fellows in the use of the materials and implements furnished, and of their failure from latent defects not revealed by practical tests, and from deterioration by the usual wear and tear. * * * * The principals may not avoid the duty which they owe to their servants of furnishing them with sound mechanical contrivances, and accompanying them with competent fellows, by conferring upon superior servants the duty of selecting and hiring. The duty being that of the principals, and theirs the contract, it is theirs to fulfil and perform, and if it is not done, or insufficiently done, the failure to do so is theirs. As is well said, 'if a master's knowledge of defects be unnecessary to his liability, the more he neglects his business and abandons it to others, the less will he be liable.' (BYLES, J., in *Holmes* v. *Clark*, W. R. 405)."

The fact that a servant became negligent after he had been employed, does not, without other evidence, show negligence in the master in selecting. *McDonald* v. *The Eagle, &c., Co.*, 67 Ga. 761; s. c. 68 Ga. 839. See generally as to the duty of master, *Drymala* v. *Thompson et al.*, 26 Minn. 40; *Railway Co.* v. *Dunham*, 49 Texas 181; *Blake* v. *Me. Cent. Ry. Co.*, 70 Me. 60; *Jordan* v. *Wells*, 3 Woods 527; *Tex. M. R. Co.* v. *Whitmore*, 58 Tex. 276; *Jones* v. *Mills*, 126 Mass. 84; *Lawler* v. *Androscoggin Ry. Co.*, 62 Me. 463; 16 Am. R. 492; *O'Connell* v. *B. & O. Ry. Co.*, 20 Md. 212; *Shauck* v. *N. C. Ry. Co.*, 25 Id. 462; *Smith* v. *Steele*, L. R., 10 Q. B. 125; 11 Eng. R. 194; *Howd* v. *Miss. Cent. Ry. Co.*, 50 Miss. 178.

If the negligence of a railway company is the efficient cause of the injury, it is liable, although the servant may have been himself in some default, and might have escaped injury by the exercise of extraordinary care. *N., &c., Ry. Co.* v. *Carroll*, 6 Heisk. (Tenn.) 348.

A railway company cannot contract in advance with its employees for the waiver and release of the liability imposed. *Kan. Pa. Ry.* v. *Peavey*, 29 Kan. 169; s. c. 44 Am. R. 630.

Where a servant engaged in the operation of machinery, by reason of his youth and inexperience, is not aware of the danger to which he is exposed, it is the duty of his master to warn him if he himself knows of it, and this notwithstanding the existence of that which renders the machinery dangerous is known to the servant. *Dowling* v. *Allen*, 74 Mo. 13. See also *Hamilton* v. *G., H., &c., Ry.*, 54 Tex. 556.

DUTY OF THE MASTER TO SELECT AND RETAIN COMPETENT FELLOW-SERVANTS.—If the master is guilty of negligence in the employment of a fellow-servant, or, after notice, continuing in his employment an incompetent servant, he is liable. *Ohio & Mississippi Ry. Co.* v. *Collarn*, 73 Ind. 261; *Marshall* v. *Shricker*, 63 Mo. 309; *McAndrew* v. *Burns*, 39 N. J. 117; *Walker* v. *Bolling*,

22 Ala. 294; *Frazier* v. *Penn. Ry.*, 38 Pa. St. 104; *Pittsb., &c., Ry. Co.* v. *Ruby*, 38 Ind. 294; *McDermott* v. *Boston*, 133 Mass. 349; *H. & T., &c., Ry.* v. *Willis*, 53 Tex. 318.

As to what is sufficient evidence of the competency of a servant, see *Gibson* v. *N. C. Ry. Co.*, 22 Hun 288; *Harvey* v. *N. Y. Cent. Ry. Co.*, 88 N. Y. 481; *Fones* v. *Phillips*, 39 Ark. 17; *Murphy* v. *St. L., &c., Ry.*, 71 Mo. 202.

A master is liable for his negligence in failing to furnish a sufficient number of servants to insure safety. *Hardy* v. *Cent. Ry.*, 76 N. C. 5.

Permission given by a railway company to an engineer to allow a fireman to act as engineer when competent, makes the company liable for a mistake or negligence of the engineer in permitting a fireman to handle the engine when incompetent for duty. *Harper* v. *Wood*, 47 Mo. 567; 14 Am. R. 353. See also *Ohio & Miss. Ry.* v. *Collarn*, 73 Ind. 261.

Where a conductor is habitually intemperate and unfit for service, and his habits and unfitness are known to the railway company, it is liable to his fellow-servants for his negligence. *Huntingdon, &c., Ry. Co.* v. *Decker*, 84 Ill. 419.

As to the liability of connecting lines of railway to employee, see *Phil., &c., Ry. Co.* v. *State*, 58 Md. 373.

DUTY OF MASTER TO FURNISH SAFE MACHINERY.—A master must provide his servants with safe and suitable machinery and appliances necessary for their work, and must also keep them in repair. *Laning* v. *N. Y. Cent. Ry.*, 40 N. Y. 521; *Flike* v. *B. & A. Ry.*, 53 N. Y. 550; *Lasure* v. *Graniteville, &c., Ry. Co.*, 18 S. C. 296; *Cowles* v. *Ry. Co.*, 84 N. C. 309; *Noyes* v. *Smith*, 28 Vt. 59; *Gallagher* v. *Piper*, 16 C. B. (N. S.) 669; *Mulchey* v. *Methodist R. S.*, 125 Mass. 487; *Green* v. *Banta*, 48 N. Y. Supr. Ct. 156.

The fact that an employee was killed in consequence of defective machinery, will not of itself make out a case against his employer. It must be shown that the employer was aware of the defect, or that by reasonable care it could have been discovered. *Elliott* v. *St. L., &c., Ry.*, 67 Mo. 272.

The master is liable for defective machinery, although the negligence of a fellow-servant contributed to the injury. *McMahon* v. *Henning*, 1 McCrary 516; *Kain* v. *Smith*, 25 Kan. 146; *Cone* v. *Del., &c., Ry.*, 81 N. Y. 206.

If the master has provided suitable material and machinery, he is not liable for the negligence or error in judgment of any of the servants in selecting and using them, provided they are of adequate skill and careful, prudent persons. *Harms* v. *Sullivan*, 1 Brad. 251; *Holden* v. *Fitchburg Ry. Co.*, 129 Mass. 268; *Marvin* v. *Muller*, 25 Hun 163; *Floyd* v. *Sugden*, 134 Mass. 563; *Collins* v. *St. P., &c., Ry.*, 30 Minn. 31.

DUTY OF SERVANT.—A servant must not have been guilty of negligence in order to recover. *McDade* v. *Ga. Ry. Co.*, 60 Ga. 119; *Cowles* v. *Ry. Co.*, 84 N. C. 309; *Kenney* v. *Cent. Ry.*, 61 Ga. 590; *Day* v. *Toledo, &c., Ry.*, 42 Mich. 523. If the employee have knowledge of imperfect machinery and continues using it, he cannot recover. *H. & T. C. Ry.* v. *Myers*, 55 Tex. 110. And if he have knowledge of an habitual and continued negligence of his employer and acquiesces therein, and continues in his service without objection or effort to correct it, he waives his rights. *Ry. Co.* v. *Knittal*, 33 Ohio St. 468; *Frazier* v. *Penn. Ry. Co.*, 38 Pa. St. 104.

It is the duty of the servant to give notice of a defect in machinery, or of the incompetency of a fellow-servant, if he have knowledge of either. *Cowles* v. *Railway Co., supra;* But where the employee is so grossly and notoriously unfit that not to know of his unfitness is

negligence, the law presumes notice to the employer. *C. & R. I. Ry. Co.* v. *Doyle*, 18 Kan. 59.

An employee must make reasonable use of his faculties to avoid danger or injury in the course of his employment. *Hughes* v. *Winona, &c., Ry.*, 27 Minn. 137. And if he voluntarily exposes himself to danger that he knows, or by reasonable attention might know, he assumes all risks thereto. *Chicago & T. Ry.* v. *Simmons*, 11 Brad. 147.

CHARLES L. BILLINGS.

Chicago.

Supreme Court of Massachusetts.

COMMONWEALTH *v.* FRANKLIN PIERCE.

To constitute manslaughter where there is no evil intent it is not necessary that the killing should be the result of an unlawful act; it is sufficient if it is the result of reckless or foolhardy presumption, judged by the standard of what would be reckless in a man of ordinary prudence under the same circumstances.

The defendant, who publicly practised as a physician, being called upon to attend a sick woman, caused her with her consent to be kept in flannels saturated with kerosene for three days, by reason of which she died. There was evidence that he had made similar applications with favorable results in other cases, but that in one the effect had been to blister and burn the flesh, as in the present case. *Held*, that the jury having found that the application was made as the result of foolhardy presumption or gross negligence, a conviction of manslaughter was proper.

Commonwealth v. *Thompson*, 6 Mass. 134, criticised.

THE facts of this case are sufficiently stated in the opinion of the court, which was delivered by

HOLMES, J.—The defendant has been found guilty of manslaughter on evidence that he publicly practised as a physician, and, being called to attend a sick woman, caused her, with her consent, to be kept in flannels saturated with kerosene for three days, more or less, by reason of which she died. There was evidence that he had made similar applications with favorable results in other cases, but that in one the effect had been to blister and burn the flesh as in the present case.

The main questions which have been argued before us are raised by the fifth and sixth rulings requested on behalf of the defendant, but refused by the court, and by the instructions given upon the same matter. The fifth request was, shortly, that the defendant must have "so much knowledge or probable information of the fatal tendency of the prescription that [the death] may be reasonably presumed by the jury to be the effect of obstinate, wilful rashness, and not of an honest intent and expectation to cure." The seventh request assumes the law to be as thus stated. The sixth request